TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~482.~~ 205

THE UNITED STATES, PLAINTIFF,

vs.

EDWARD T. GALE AND WILLIAM S. GIBSON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED NOVEMBER 24, 1880.

109-63764

Poindexter v. Greenhow

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Vol.

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No. ~~182.~~ 205

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SUPREME COURT OF THE UNITED STATES.

No. 462.

THE UNITED STATES, PLAINTIFF,

vs.

EDWARD T. GALE AND WILLIAM S. GIBSON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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1 United States circuit court, 5th judicial circuit, northern district of Florida.

FRIDAY MORNING, *December 20th*, 1878.

Court met persuant to adjournment. Present, the honorable Thomas Settle, judge. Court was opened in due form by the crier.

The grand jury came into court and presented the following indictments:

THE UNITED STATES
vs.
EDWARD T. GALE & WILLIAM S. GIBSON. } Indictment for violation of election laws.

A true bill.

CHARLES D. BRIGHAM,
Foreman.

* * * * * * *

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Ordered, that this court do now adjourn until to-morrow morning at 10 o'clock.

2 In the circuit court of the United States, for the northern district of Florida, in the fifth circuit.

At a stated term of the circuit court of the United States for the northern district of Florida, in the fifth circuit, begun and held at the city of Jacksonville, within and for the district and circuit aforesaid, on the second day of *of* December, A. D. one thousand eight hundred & seventy-eight.

NORTHERN DISTRICT OF FLORIDA, *ss:*

The grand jurors of the United States of America, impannelled and sworn within and for the district aforesaid, on their oath present, that heretofore, to wit, on the fifth day of November, in the year of our Lord one thousand eight hundred & seventy-eight, a general election was held in the State of Florida, at which general election a Representative in the Congress of the United States was voted for, and votes were cast and given for a Representative in said Congress, in the county of Marion, in said State of Florida, in the northern district of Florida, to wit, at election district number eight, a duly established election dis-
3 trict, in said county of Marion, of which el ction Lemuel G. Dillard, James Gregory, and Savannah Jordon were inspectors, and Edward T. Gale was clerk thereof, and William S. Gibson was a supervisor of election, at said election district, at said election.

That at said election in said election district number eight, a ballot-box was then and there used for the reception of ballots, votes, and tickets, whereupon the names of persons to be voted for for Representative in said Congress were contained; and a large number of such ballots, votes, and tickets, duly cast at said election for Representative in said Congress, to wit, one hundred, were then and there deposited in said ballot-box.

And the grand jurors aforesaid, on their oath aforesaid, do present

and say, that the said Edward T. Gale, clerk of said election as aforesaid, and the said William S. Gibson, supervisor of said election as aforesaid, in said election district number eight as aforesaid, did then and there, to wit, on said fifth day of November, in the year aforesaid, at the said election district number eight, within said northern district of Florida, and within the jurisdiction of this court, knowingly and unauthorized by law, remove and abstract from said ballot-box a large number of such ballots, votes, and tickets aforesaid, cast as
4 aforesaid, to wit, one hundred, and did knowingly and unauthorized by law, then and there substitute in place thereof ballots, votes, and tickets, bearing names of other and different persons for Representative in said Congress from those so cast as aforesaid, and removed and abstracted by them as aforesaid, thereby affecting said election at said election district number eight, and the result thereof, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

2ND COUNT.—And the grand jurors aforesaid, upon their oath aforesaid, do further present that, heretofore, to wit, on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, a general election was held in the State of Florida, at which general election a Representative in the Congress of the United States was voted for, and votes were cast and given for a Representative in said Congress, in the county of Marion, in said State of Florida, within the northern district of Florida, to wit, at election district number eight, an established election district in said county of Marion, of which election in said election district number eight, Lemuel G. Dillard, James
5 Gregory, and Savannah Jordan were inspectors, and Edward T. Gale was clerk thereof, and William S. Gibson was a supervisor of election at said election district number eight, at said election. That at said election in said election district number eight, a ballot-box was then and there used for the reception of ballots, votes, and tickets, whereon the names of persons to be voted for for Representative in said Congress were contained, and a large number of such ballots, votes, and tickets, duly cast at said election for Representative in said Congress, to wit, one hundred, were then and there deposited in said ballot-box.

And the grand jurors aforesaid, on their oath aforesaid, do present that the said Edward T. Gale and the said William S. Gibson, officers of election as aforesaid, in said election district number eight as aforesaid, did then and there, to wit, on the fifth day of November aforesaid, in the year aforesaid, at said election district number eight, within said northern district of Florida, and within the jurisdiction of this court, knowingly and unauthorized by law, remove and abstract from said ballot-box a large number of such ballots, votes, and tickets aforesaid, cast as aforesaid, to wit: One hundred ballots, votes,
6 and tickets; and did knowingly and unauthorized by law, then and there substitute in place thereof ballots, votes, & tickets bearing names of other and different persons for Representative in said Congress of the United States from those so cast as aforesaid, and removed and abstracted by the said Edward T. Gale and the said William S. Gibson, officers of election as aforesaid, with intent thereby to effect the said election, at said election district "number eight," and the result thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN B. STICKNEY,
United States Attorney for the Northern District of Florida.

7 And now this 7th May, 1879, come the defendants, and say severally they are not guilty.

FLEMING & DANIEL,
JOHN E. HORTRIDGE,
JNO. T. WALKER,
Def'dts' Att'y.

(Indorsed:) In the circuit court of the United States for the northern district of Florida, in the fifth circuit. The United States vs. Edward T. Gale & William S. Gibson. Indictment for violation of election laws.

A true bill.

CHARLES D. BRIGHAM,
Foreman.

Witnesses: I. L. McGahagan, Adam Sly, Agrippa Jacobs, W. H. Le Cain, Savannah Jordon.

Filed Dec. 20th, 1878. P. Walter, clerk. John B. Stickney, U. S. attorney.

8 The President of the United States of America to the marshal of the United States, northern district of Florida, greeting:

You are hereby commanded to arrest Edward T. Gale, if he be found in your district, and him safely keep so that you have his body forthwith before the judge of the district court of the United States for the northern district of Florida, at the court-room in the city of Jacksonville, in said district, to answer unto the United States upon an indictment against him in said court.

Witness the honorable Thos. Settle, judge of said court, and the seal thereof, at the city of Jacksonville, in said district, this 20th day of December, A. D. one thousand eight hundred & seventy-eight.

[SEAL.] P. WALTER, *Clerk.*

9 (Indorsed:) U. S. district court, northern district of Florida. The United States vs. Edward T. Gale. Warrant of arrest. Issued Dec. 20th, 1878. Returnable 187 . Filed Jan'y 8th, 1879. Philip Walter, clerk.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF FLORIDA,
Jacksonville, Fla., Dec. 29th, 1878.

Albertos Vogt is hereby appointed special deputy U. S. marshal to execute the within writ of capias.

S. CONANT,
U. S. Marshal.

Executed the within writ of capias in Marion County, within the northern district of Florida, on the 4th day of Jan., A. D. 1879, by arresting the within named Edward T. Gale and bringing him into court.

Dated Jan. 8th, 1879.

S. CONANT,
U. S. Marshal,
By ALBERTUS VOGT,
Deputy.

10 The President of the United States of America to the marshal of the United States, northern district of Florida, greeting:

You are hereby commanded to arrest William S. Gibson, if he be found in your district, and him safely keep so that you have his body forthwith before the judge of the district court of the United States for the northern district of Florida, at the court-room in the city of Jacksonville, in said district, to answer unto the United States upon an indictment against him in said court.

Witness the honorable Thos. Settle, judge of said court, and the seal thereof, at the city of Jacksonville, in said district, this 20th day of December, A. D. one thousand eight hundred and seventy-eight.

[SEAL.] P. WALTER, *Clerk.*

11 (Indorsed:) U. S. district court, northern district of Florida. The United States vs. William S. Gibson. Warrant of arrest. Issued Dec. 20th, 1878. Returnable, , 187 . Filed Jan'y 4th, 1879.

PHILIP WALTER, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF FLORIDA,
Jacksonville, Florida, Dec. 22, 1878.

Albertus Vogt is hereby appointed special deputy U. S. marshal to execute the within writ of capias.

S. CONANT,
U. S. Marshal.

Executed the within writ of capias in Marion County, within the northern district of Florida, this 29th day of Dec., A. D. 1878, by arresting the within-named William S. Gibson, and bringing him into court.

Dated Jan. 4th, 1879.

S. CONANT,
U. S. Marshal,
By ALBERTUS VOGT,
Deputy.

12 United States circuit court, 5th judicial circuit, northern district of Florida.

THURSDAY MORNING, *Jan'y 16th,* 1879.

Court met persuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

UNITED STATES
vs.
E. T. GALE.

Ordered, that subpœnas for the following witnesses on the part of the defendant do issue at the expense of the United States: Alfred Ayer, L. Dillard, and James Gregory.

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Ordered, that this court do adjourn untill to-morrow morning at 10 o'clock.

13 United States circuit court, 5th judicial circuit, northern district of Florida.

THURSDAY MORNING, *January* 23, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

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THE UNITED STATES *vs.* EDWARD T. GALE & WILLIAM S. GIBSON. } Indictment for violation of election laws.

On motion of the district attorney, ordered, that this cause be continued to the first Monday in May.

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THE UNITED STATES *vs.* WILLIAM S. GIBSON. } Indictment for violation of election laws.

William S. Gibson, who stands indicted for violation of election laws, appeared in open court, and acknowledged himself to owe and stand indebted to the United States in the sum of three thousand
14 dollars, to be made and levied of his goods and chattels, lands and tenements and Charles Gibson and L. G. Dillard, acknowledge themselves to owe and stand indebted severally to the United States in the sum of three thousand dollars each, to be made and levied of their several goods and chattels, lands and tenements:

Conditioned that if the said William S. Gibson shall appear before this court on the first Monday in May next, to answer to said indictment, and shall abide the order of the court and shall not depart the same without leave of the court, then this recognizance shall be void, else remain in full force and virtue.

THE UNITED STATES *vs.* EDWARD T. GALE. } Indictment for violation of election laws.

Edward T. Gale, who stands indicted for violation of election laws, appeared in open court and acknowledged himself to owe and stand indebted to the United States in the sum of three thousand dollars, to be made and levied of his goods and chattels, lands and tenements, and Charles Gibson and L. G. Dillard, acknowledge themselves to severally owe and stand indebted to the United States in the sum of three thousand dollars each, to be made and levied of their
15 several goods and chattels, lands and tenements:

Conditioned if the said Edward T. Gale shall appear before this court on the first Monday in May next, to answer to said indictment, and shall abide the order of the court, and shall not depart the same without leave of the court, then this recognizance shall be void, else remain in full force and virtue.

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Ordered, that this court do now adjourn untill to-morrow morning at 10 o'clock.

16 United States circuit court, fifth judicial circuit, northern district of Florida.

TUESDAY, *May 6th*, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

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UNITED STATES *vs.* WILLIAM S. GIBSON. } Indictment for violation of election laws.

Now comes the United States district attorney and moves the court to have the bond given by the defendant, William S. Gibson, and sureties estreated.

It appearing to the court that the defendant, William S. Gibson, has given a bond in the sum of three thousand dollars, with Charles Gibson and L. G. Dillard as sureties, to be and appear at this court from time to time to answer unto an indictment for violation of election laws; and it further appearing to the satisfaction of the court that the said William S. Gibson has failed to appear and answer to said indictment, and the said William S. Gibson being three times solemnly called
17 in open court, came not, but made default, and the said Charles Gibson and L. G. Dillard, being three times solemnly called in open court and commanded to produce the body of the said William S. Gibson, and the said sureties having made default and failed to comply with the commands of the court and the terms and conditions of said bond:

It is therefore ordered by the court that the bond of the said William S. Gibson, principal, and Charles Gibson and L. G. Dillard, sureties, be, and the same is hereby, estreated.

UNITED STATES *vs.* EDWARD T. GALE. } Indictment for violation of election laws.

Now comes the United States district attorney and moves the court to have the bond given by the defendant, Edward T. Gale, and sureties, estreated. It appearing to the court that the defendant, Edward T. Gale, has given a bond in the sum of three thousand dollars, with Charles Gibson and L. G. Dillard as sureties, to be and appear at this court from time to time to answer unto an indictment for violation of election laws; and it further appearing to the satisfaction of the court that the said Edward T. Gale has failed to appear and answer to said indictment, and the said Edward T. Gale being three times solemnly called in
18 open court, came not, but made default, and the said Charles Gibson and L. G. Dillard, being three times solemnly called in open court and commanded to produce the body of the said Edward T. Gale, and the said sureties having made default and failed to comply with the commands of the court and the terms and conditions of said bond, it is therefore ordered by the court that the bond of the said Edward T. Gale, principal, and Charles Gibson and L. G. Dillard, sureties, be, and the same is hereby, estreated.

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Ordered, that this court do now adjourn untill to-morrow morning at 10 o'clock.

WEDNESDAY, *May 7th*, 1880.

Court met pursuant to adjournment. Present, honorable Thomas Settle, judge. Court was opened in due form by the crier.

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UNITED STATES
vs.
WILLIAM S. GIBSON EDWARD T. GALE. } Indictment for violation of election laws.

On motion of defendants' counsel, ordered, that the orders made yesterday estreating the bonds given by said defendants & sureties be, and the same are hereby, vacated and set aside.

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19 UNITED STATES
vs.
WILLIAM S. GIBSON & EDWARD T. GALE. } Indictment for violation of election laws.

This cause came on this day to be heard; defendants pleaded not guilty. Thereupon came the following jury, to wit: Fred. W. Hoyt, Jerome C. Andreu, William H. Lucas, Peter Jones, Joseph M. Michel, George Hess, William B. Hicks, Thomas S. Swaim, Henry R. Jackson, George Cole, Prince Johnson, E. D. Ward, who were duly empannelled and sworn, and the case not being concluded at the hour of adjournment, it was ordered that this court do adjourn untill to-morrow morning at ten o'clock.

THURSDAY, *May 8th*, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

UNITED STATES
vs.
WILLIAM S. GIBSON & EDWARD T. GALE. } Indictment for violation of election laws.

This cause coming on to be further heard this day, the jury were called and answered to their names, as follows: Fred. W. Hoyt, Jerome C. Andreu, William H. Lucas, Peter Jones, Joseph M.
20 Michel, George Hess, William B. Hicks, Thomas S. Swaim, Henry R. Jackson, George Cole, Prince Johnson, E. D. Ward, Said cause not being concluded at the hour of adjournment, ordered that this court do adjourn untill to-morrow morning at ten o'clock.

FRIDAY, *May 9th*, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

THE UNITED STATES
vs.
WILLIAM S. GIBSON & EDWARD T. GALE. } Indictment for violation of election laws.

This cause coming on to be further heard this day, the jury were called and answered to their names, as follows: Fred. W. Hoyt, Jerome C. Andeu, William H. Lucas, Peter Jones, Joseph M. Michell, George Hess, William B. Hicks, Thos. S. Swaim, Henry R. Jackson,

George Cole, Prince Johnson, E. D. Ward. Said cause continuing to the hour of adjournment, and not being concluded, it was ordered that this court do adjourn to to-morrow morning at 10 o'clock.

SATURDAY, *May 10th*, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

21 UNITED STATES
vs.
WILLIAM S. GIBSON & EDWARD T. GALE. } Indictment for violation of election laws.

This cause coming on to be further heard this day, the jury were called and answered to their names, as follows: Fred. W. Hoyt, Jerome C. Anden, William H. Lucas, Peter Jones, Joseph M. Michel, George Hess, Willam B. Hicks, Thomas S. Swaim, Henry R. Jackson, George Cole, Prince Johnson, E. D. Ward.

The testimony being concluded, after hearing the argument of counsel, and the charge of the court, the jury, after consideration, returned the following verdict:

We, the jury, find the defendants guilty.

The counsel for the defendants gave notice of a motion for a new trial.

Ordered, that the prisoners be remanded to the custody of the marshal.

Ordered, that this court do adjourn untill Monday morning, at 10 o'clock.

MONDAY, *May* 12, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

UNITED STATES
vs.
WILLIAM S. GIBSON & EDWARD T. GALE. } Indictment for violation of election laws.

22 This cause came on to be heard this day upon the motion of defendants' counsel for an arrest of judgment upon the verdict heretofore found against said defendants.

The argument of counsel on said motion was concluded at the hour of adjournment, and the court reserved its decision.

Ordered, that this court do adjourn to to-morrow morning at 10 o'clock.

FRIDAY, *May 30th*, 1879.

Court met pursuant to adjournment. Present, Hon. Joseph P. Bradley, presiding justice; Hon. Thomas Settle, district judge. Court was opened in due form by the crier.

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UNITED STATES
vs.
WM. S. GIBSON & E. T. GALE. } Motion for new trial.

Ordered, that the motion be overruled.

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Ordered, that this court do now adjourn untill to-morrow morning at ten o'clock.

23 THURSDAY MORNING, *June 12th*, 1879.

Court met pursuant to adjournment. Present, the honorable Thomas Settle, judge. Court was opened in due form by the crier.

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UNITED STATES *vs.* EDWARD T. GALE. } Indictment for violation of election laws.

Recognizance.

Edward T. Gale, who stands indicted for violation of election laws, appeared in open court and acknowledged himself to owe and stand indebted to the United States in the sum of three thousand dollars, to be made & levied of his goods & chattels, lands & tenements.

And Henry Robinson, Uriah Bowden, Charles Gibson, John H. Burton, Morris A. Dzialynski, and P. McQuaid acknowledge themselves jointly and severally to owe & stand indebted to the United States in the sum of three thousand dollars, to be made & levied of their several goods & chattels, lands & tenements.

Conditioned that the said Edward T. Gale shall be and appear at the next term of this court, and from term to term to abide the order of the court, and not depart the same without leave, then this recognizance to be void; else to remain in full force & effect.

24 UNITED STATES *vs.* WILLIAM S. GIBSON. } Indictment for violation of election laws.

William S. Gibson, who stands indicted for violation of election laws, appeared in open court and acknowledged himself to owe and stand indebted to the United States in the sum of three thousand dollars, to be made & levied of his goods & chattels, lands & tenements.

And Henry Robinson, Uriah Bowden, Charles Gibson, John H. Burton, Morris A. Dzialynski, and P. McQuaid acknowledge themselves jointly & severally to owe & stand indebted to the United States in the sum of three thousand dollars, to be made & levied of their several goods & chattels, lands & tenements:

Conditioned that the said William S. Gibson shall be and appear at the next term of this court, & from term to term to abide the order of the court, and not depart the same without leave, then this recognizance to be void; else to remain in full force and effect.

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Ordered, that this court do now adjourn untill to-morrow morning at 10 o'clock.

25 United States circuit court, fifth judicial circuit, northern district of Flordia.

TUESDAY, *June 3d*, 1879.

Court met pursuant to adjournment. Present, Hon. Thomas Settle, judge. Court was opened in due form by the crier.

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UNITED STATES
vs.
WILLIAM S. GIBSON AND EDWARD T. GALE. } Indictment for violation of election laws.

It being suggested to the court that the record of the empannelling of the grand jury should be corrected, now, that such record may speak the truth, and in the presence of J. B. Stickney, esq., U. S. district attorney, of L. I. Fleming, John E. Hartridge, and John T. Walker, esquires, counsel for the defendants, it is ordered that the following be entered, nunc pro tunc, as of the 3d day of December, A. D. 1878, as being in fact the proceedings and order taken in the premises:

It being suggested to the court by the district attorney that
26 certain of the persons summoned as grand jurors at this term are disqualified under section 820, Revised Statutes, and the court being of the opinion that said section is operative, and creates a positive disqualification as to the persons so included—

After having the grand jurors sworn upon their voir dire, the court read to them section 820 of the Revised Statutes of the United States, and inquired of the jurors if any of them had committed any of the acts denounced by the said section 820:

Whereupon, the following jurors announced that they had committed acts denounced by said section, and were excused from further attendance at the present term, on account of the disqualifications under section 820 of the Revised Statutes, to wit:

Joseph N. Haddock, James Y. Wilson, John McMurray, S. A. Beausang.

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Ordered, that this court do now adjourn until to-morrow morning at 10 oclock a. m.

27 *Certificate of division.*

At a circuit court of the United States begun and held at Jacksonville, in the northern district of Florida, on the second day of December, A. D. 1878, and afterwards, on the seventh day of April, A. D. 1879, adjourned to and held at the place aforesaid, on and after the 5th day of May, A. D. 1879.

Present, the honorable Joseph P. Bradley and Thomas Settle, judges.

THE UNITED STATES
vs.
EDWARD T. GALE AND WILLIAM S. GIBSON.

An indictment was found against the defendants, Edward T. Gale and William S. Gibson, at the present term of this court, under sections 5512 and 5515 of the Revised Statutes of the United States, for knowingly, and unauthorized by law, removing and abstracting ballots from the ballot-box of district No. 8, in Marion County, within the northern district of Florida, on the 5th day of November, A. D. 1877, at an election for member of Congress from the second Congressional district of Florida held that day, and knowingly and unauthorized by law substituting therefor tickets and ballots bearing names of other and different persons for Representative in said Congress than those for whom the said ballots were cast, thereby fraudulently affect-
28 ing the result of said election.

The grand jury which found this indictment were empaneled and sworn under section 820 of the Revised Statutes of the United States.

On this indictment, on the seventh day of May, A. D. 1879, the defendants named above were arraigned and pleaded "not guilty." Whereupon a jury was empaneled, evidence for the United States and for the defendants was presented, and the cause being argued by counsel for and against the prisoners, the issues were submitted to the jury under the charge of the court. The jury then retired, and afterwards, to wit, on the tenth day of May, A. D. 1879, returned into court with a verdict of "guilty" as to both of the defendants, which verdict was duly received and recorded. Whereupon the following motion was made by counsel for the defendants:

UNITED STATES
vs.
EDWARD T. GALE AND WILLIAM S. GIBSON.

And now, this 12th day of May, A. D. 1879, come the defendants, by their attorneys, John E. Hartridge and John T. Walker, and move the court that judgment upon the verdict heretofore found against them be arrested upon the grounds following:

29 2nd. That the indictment is vague, general, uncertain, and altogether insufficient in law to support a judgment against these defendants.

1st. That the indictment does not change any offences.

3d. That the sections of the Revised Statutes of the United States upon which the indictment is founded, are all and every of them unconstitutional and void.

4th. Because the grand jury which found the indictment was illegally empaneled.

5th. That Joseph H. Haddock, James Y. Wilson, John McMurray, and S. A. Beausang, who were duly drawn and summoned to serve as grand jurors at this term of this court, were illegally excluded from said grand jury as being severally disqualified under the provisions of sections 820 of the Revised Statutes of the United States.

6th. Because section 820 of the Revised Statutes aforesaid, under the provisions of which this grand jury was empaneled and sworn, are unconstitutional and void.

JOHN E. HARTRIDGE,
JOHN T. WALKER,
Def'ts' Att'ys.

To U. S. DISTRICT ATT'Y.

This motion coming on to be argued, and having been submitted to the honorable judges aforesaid at this term, to wit, on the 31st day of May, A. D. 1879, it occurred as a question whether sections 5512 and 5515 of the Revised Statutes of the United States, on which such

30 indictment was founded, are repugnant to and in violation of the Constitution of the United States, and whether section 820 of the Revised Statutes of the United States are repugnant to and in violation of the Constitution of the United States, and whether judgment of this court could be rendered against the defendants on an indictment found by a grand jury empaneled and sworn under the sections aforesaid, and whether the indictment aforesaid charges any offence for which judgment could be rendered against the defendants in this court

under the Constitution and laws of the United States; on which several questions the opinions of the judges were opposed.

Whereupon, on a motion of the defendants by their counsel, that the several points on which the disagreements have happened, made during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided.

It is ordered that the foregoing state of the pleadings and points of difference and the following statement of facts which is made under the direction of the judges, be certified according to the request of the defendants by their counsel, and the law in that case made and provided, to wit, that Joseph H. Haddock, James Y. Wilson, John McMurray,
and S. A. Beausang, who were duly drawn and summoned to
31 serve as grand jurors at this term of this court, were excluded
from said grand jury, by which said indictment was found, as severally disqualified under the provisions of sections 820 of the Revised Statutes of the United States.

32 United States circuit court, fifth judicial circuit, northern district of Florida.

THE UNITED STATES
vs.
EDWARD T. GALE & WILLIAM S. GIBSON. } Indictment for violation of election laws.

I, Philip Walter, clerk of the United States circuit court for the fifth circuit, northern district of Florida, do hereby certify that the foregoing is a true transcript of the record and proceedings in the above-entitled case as fully as the same remains on file and of record in said case in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of this court at the city of Jacksonville, in the district and circuit aforesaid, this 12th day of April, 1880, and of our Independence the 104th year.

[SEAL.] PHILIP WALTER, *Clerk.*

(Indorsement on cover:) No. 462. The United States, plaintiffs, vs. Edward T. Gale and William S. Gibson. Certificate of division. N. Florida, C. C. U. S. Filed 24th November, 1880.

109-65

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES *vs.* GALE AND OTHERS. } No. 462.

BRIEF FOR THE UNITED STATES.

under the Constitution and laws of the United States; on which several questions the opinions of the judges were opposed.

Whereupon, on a motion of the defendants by their counsel, that the several points on which the disagreements have happened, made during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided.

It is ordered that the foregoing state of the pleadings and points of difference and the following statement of facts which is made under the direction of the judges, be certified according to the request of the defendants by their counsel, and the law in that case made and provided, to wit, that Joseph H. Haddock, James Y. Wilson, John McMurray,
and S. A. Beansang, who were duly drawn and summoned to
31 serve as grand jurors at this term of this court, were excluded from said grand jury, by which said indictment was found, as severally disqualified under the provisions of sections 820 of the Revised Statutes of the United States.

32 United States circuit court, fifth judicial circuit, northern district of Florida.

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This case presents a certificate of division upon certain questions arising in the court below upon an indictment for *stuffing* a ballot-box upon an election for Congressman in Florida.

The indictment was in two counts, substantially as follows (Record, pp. 1 and 2):

1. That on November 5, A. D. 1878, at an election at which a Representative in Congress, &c., was voted for, in the county, &c., at election district number eight, of which election Edward T. Gale was clerk, and William S. Gibson was a supervisor, a ballot-box was used for receiving votes containing the names of persons voted for said Representative, and a large number of such

votes duly cast were then and there deposited in said box.

And the grand jurors aforesaid, &c., say that the said Edward T. Gale, *clerk*, &c., and the said William S. Gibson, *supervisor*, &c., did then and there, to wit, &c., knowingly and unauthorized by law, remove and abstract from said ballot-box a large number of such ballots, &c., cast as aforesaid, to wit, *one hundred*, and did knowingly and unauthorized by law, then and there substitute in place thereof, ballots, &c., bearing names of other and different persons for Representative in said Congress from those so cast as aforesaid, and removed and abstracted by them as aforesaid, *thereby affecting said election at said election* district number eight, and the result thereof, contrary, &c.

2. That the said Edward T. Gale and the said William S. Gibson, *officers of election* as aforesaid, &c., did then and there, to wit, &c., knowingly and unauthorized by law, *remove and abstract from said ballot-box a large number of such ballots*, &c., to wit, *one hundred ballots*, votes, and tickets; *and did knowingly and unauthorized by law then and there substitute in place thereof ballots*, votes, and tickets bearing names of other and different persons for Representative in said Congress of the United States from those so cast as aforesaid, and removed and abstracted by the said Edward T. Gale and the said William S. Gibson, officers of election as aforesaid, *with intent thereby to affect the said election*, at said election district "number eight," and the result thereof contrary to the form, &c.

To this indictment the defendants pleaded, severally, *not guilty.* (P. 3.)

It appears upon the record that the grand jury which found the above bill had been organized in accordance with section 820 of the Revised Statutes; and that thereupon four of the jurors had been rejected by the court as disqualified. (P. 10.)

The defendants having been convicted, a motion was made to arrest the judgment on account of (1) *defects* in the indictment; (2) the *unconstitutionality of sections* 5512 *and* 5515 Revised Statutes, upon which the indictment was framed, *and also* (3) *that of section* 820, under which the four grand jurors were rejected.

Thereupon the court certified as follows (p. 11):

This motion coming on to be argued, and having been submitted to the honorable judges aforesaid at this term, to wit, on the 31st day of May, A. D. 1879, it occurred as a question whether sections 5512 and 5515 of the Revised Statutes of the United States, on which such indictment was founded, are repugnant to and in violation of the Constitution of the United States, and whether section 820 of the Revised Statutes of the United States are repugnant to and in violation of the Constitution of the United States, and whether judgment of this court could be rendered against the defendants on an indictment found by a grand jury impaneled and sworn under the sections aforesaid, and whether the indictment aforesaid charges any offense for which judgment could be rendered against the defendants in this court under the Constitution and laws of the United States; on which several questions the opinions of the judges were opposed.

Whereupon, on a motion of the defendants by their counsel, made during the term, that the several points on which the disagreements

have happened be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, to be finally decided:

It is ordered that the foregoing state of the pleadings and points of difference and the following statement of facts which is made under the direction of the judges, be certified according to the request of the defendants by their counsel, and the law in that case made and provided, to wit, that Joseph H. Haddock, James Y. Wilson, John McMurray, and S. A. Beausang, who were duly drawn and summoned to serve as grand jurors at this term of court, were excluded from said grand jury, by which said indictment was found as severally disqualified under the provisions of sections 820 of the Revised Statutes of the United States.

1. Since the giving of this certificate, the cases of *Siebold* and *Clarke* (100 U. S., pp. 371 and 399) have been decided.

These cases show that it is competent for *Congress* by punitive provisions to concur in enforcing any *State* legislation intended to protect elections for members of Congress.

They are consequently relied upon here by the government as having settled the *difference* certified from below as to the constitutionality of section 5515, and by analogy, as is submitted, also that as to section 5512. (See appendix.)

2. As for the *indictment*, it seems substantially to conform to the 5th count of that against *Gude* and *Tucker* (a case included in that of *Siebold*), given at p. 378 of vol. 100, United States Reports.

That count is as follows:

(5th.) That the said Justus J. Gude and the said Walter Tucker,

on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully, at the said election, did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of section 5514 of said statutes), which had not been voted at said election in said precinct, before the ballots, then and there lawfully deposited in the same ballot-box had been counted, with intent thereby to affect said election and the result thereof, contrary to section 5515 of said statutes, and against the peace, government, and dignity of the United States.

3. This leaves for consideration the validity of the proceedings in this case, so far as they depend upon section 820. (See appendix.)

Granting that the general pardon issued by President Johnson in December, 1868 (15 Stat., 711), wiped out all guilt connected with the acts specified in section 820, it seems probable that the condition to which a citizen of the United States who comes within no police regulation, and no provision requiring due health of body and mind in jurors, but who, notwithstanding, is prohibited, by ex post facto legislation, from acting as a juror, upon grounds which it is impossible for him by his own exertions to remove, is a condition of *involuntary servitude* within the meaning of the Thirteenth Amendment; and so is prohibited.

It is to be observed here that there is in the present case no appearance of objection upon the part of the jurors to the judgment pronouncing them disqualified.

The probability is that in fact they did not object. Supposing, however, that public policy may require that as to certain personal SERVITUDES *conclusive presumption exists that they are* INVOLUNTARY; and therefore supposing that courts will not hear evidence as to the actual state of will of this or that inconsiderate person who may pretend, or be disposed, to disparage his own liberty, and thereby to stain the society of which he is a member; or, in other words, supposing that as to such servitudes that which is *involuntary* as to the citizen of highest spirit and sense of freedom must be conclusively presumed by the law to be so as to all citizens, it seems that such servitude as cuts off from jury service persons who for all matters of police, or health, or sanity, or morals, are qualified therefor, should come within that class. The *officinum*, or public *duty* of being juror is of the same quality as that of holding any position whatever of profit or trust under the government, and therefore the relation of citizens to the former is to be preserved *absque disparagatione*, as fully as it is to the latter.

Admitting, therefore, for the purposes of the argument that the four persons excluded were constitutionally qualified to become grand jurors,—and that the defendants had a constitutional interest in their being *not* excluded, a question arises as to whether they have asserted that interest in apt time. The exercise of this right is one that by inaction at the proper time might be *waived* by the *defendants* as fully as it seems to have been by the *persons* excluded.

The question is, whether persons who have been indicted—have acknowledged the indictment and pleaded *not guilty*,—and who subsequently have been tried and

convicted by a petit jury—can raise objections to the constitution of the grand jury which found the bill.

It is to be admitted that the fact of exclusion and the cause thereof appears here *upon the face of the record*,—but it is submitted that to constitute technical error there must appear to have been not only an *exclusion of a good juror*, but an exclusion *dissented from in apt time by the defendants;* whilst the record before the court shows an exclusion *acquiesced in by the defendants ;* inasmuch as by going to trial upon a plea of *not guilty* they admitted that such proceedings had occurred previously as required them to put themselves upon the country. Such a record, therefore, does not *save* the mistake throughout the pendency of the case.

It would be different in case of such an erroneous proceeding with regard to the grand jury as could not be validated by the assent of the defendant. Such was Haiden's case in 2d Richardson, 583, where it was held, upon motion in arrest after a verdict of *guilty*, that the grand jury which had found the bill was not such for the term in which it had acted. See other cases cited to same effect, in Bishop, Crim. Proced., 33d ed., sec. 889, n. 8.

I observe in this connection that, except as above admitted, the rule on this subject laid down by Wharton (Crim. Pl. and Pr., 8th ed., sec. 353) is erroneous. Of the cases cited by him, Haiden's case is as above, and the other three give no sort of sanction to his suggestion that the doctrine as to waiver does not apply to objections of record. Motions to arrest were *overruled* in each of those cases.

If I am correct in the position that errors of record in organizing a grand jury are, in point of reason, as liable

to the effect of waiver as errors in pais—I need only cite a few of the authorities upon the subject in general.

Wharton (Crim. Pl. and Pr., 8th ed. sec. 350):

> Ordinarily, after the general issue has been pleaded, objections [to the grand jury] are too late; and when the objection goes to the manner of *drawing* [which is the objection in question], it should be taken by challenge to the array. Such is undoubtedly the English rule, as well as that existing in most parts of the United States. But on principle in those cases in which the defendant is surprised, and had no authority to take exception until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea.

So Bishop (Crim. Proced., 3d ed.), in a chapter entitled "Methods for taking advantage of errors in the grand jury's organization and doings," mentions *Challenge*, *Motions to quash*, and *Plea in abatement;* adding:

> In general, objections of the kind we are considering are waived, if not by a failure to challenge, at least by a plea to the merits. Therefore, they cannot be taken at the trial. *A fortiori*, it is too late after verdict to raise an objection of this class; as, that the jury was not lawfully organized, or a member was disqualified, especially if the imperfection was known before. (Vol. I, ch. 60.)

The error in *McEntyre's Case* (2 Carolina Law Repository, 287), where a venire of *forty* had been returned, (instead of *thirty* as by law directed), was an error *of record*. After a conviction of murder, the defendant moved in arrest of judgment, assigning as one reason therefor the matter above. The court declined to pass upon the validity of this objection because it was not allowable *after trial:* quoting, "for the sake of authenticity," the following passage from Brooke's Abridgment (Indict. 2):

> "Q ou home est indite de fel' p ceux dont part sont indites ou ult' de fel', et ant acquite pi pdn, issint q ils ne sont probi nec legales homenes, ideo fuit agard que les inditemts p eux present sera

void, et les parties q sont indites ne sera arraignes sur ceo, et nota q cest matter doet estr pledr p cesty q est arr sur cest inditemt devant que il plede al felony."

The meaning of this we take to be that "where a man is indicted of felony by those, a part of whom have been indicted or outlawed of felony, and have been acquitted by a general pardon, so that they are not good and lawful men; therefore it was adjudged, that the indictments by them presented shall be void, and the parties who are indicted shall not be arraigned on them; and note that this matter ought to be pleaded by him who is arraigned on such indictment before he pleads to the felony."

The rule mentioned above by Brooke, that persons who had received a general pardon in parliament did not thereby become *probi et legales* for jury purposes, is explained by a statute of 13 Richard 2d, which enacted that *general pardons* by the king (*i. e.*, pardons not specifying the party and the crime) should not extend to treasons and certain felonies. (Bacon's Abr., "Pardon," D.) This seems to have become a rule of construction for all pardons by the king, whether *in* parliament or *not*.

Seaborn's case (4 Dev., 305) affords another instance in which, after a conviction for murder, the defendant was held to be too late in calling attention to what was admitted by the court to be an *error* upon the record in constituting the grand jury; RUFFIN, C. J., delivering the opinion.

Robinson's case (2 Parker's Crim. Cases, p. 308) affords still another such instance.

I need cite no other decisions, as it is evident that inasmuch as the drawing of the grand jury from the venire, and its organization are matters which in general take

place in open court, most of the cases as to mistakes thereabouts, must be cases of mistakes *of record*, so that the general rule is one in a great degree deduced from cases like that now under consideration.

The only Florida case that I have found is that of *Kitrol*, (9 Florida, 1), in which the alleged error in constituting the grand jury consisted in returning upon the venire a man past the legal age. The objection was taken by a *plea in abatement*. This *method* was sustained; the court saying: "It is clear that a defendant before issue joined may plead the objection."

Upon the whole, it being as true of *constitutional* rights as of any other, that *leges vigilantibus non dormientibus subveniunt*, and the constitutional right in the present case being one plainly brought to the defendants' attention upon their first coming into court, it seems that the usual rule of *waiver* is to be applied.

I take no notice of the circumstance that this error was made to appear *of record* by an amendment after the trial. For it is not suggested that the defendants were not previously aware of the fact so made to appear. The record speaks *nunc pro tunc*, and if such theory were untrue as to these defendants, they should have shown it,—and applied to the court below for such remedy as was fitting. This circumstance cannot affect the answers to be returned upon a *certificate of division*.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

Revised Statutes, SEC. 812. No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge.

SEC. 820. The following shall be causes of disqualification and challenge of grand and petit jurors in the courts of the United States, in addition to the causes existing by virtue of section eight hundred and twelve, namely: Without duress and coercion to have taken up arms or to have joined any insurrection or rebellion against the United States; to have adhered to any insurrection or rebellion, giving it aid and comfort; to have given, directly or indirectly, any assistance in money, arms, horses, clothes, or anything whatever, to or for the use or benefit of any person whom the giver of such assistance knew to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States, or whom he had good ground to believe to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States; or to have counseled or advised any person to join any insurrection or rebellion, or to resist with force of arms the laws of the United States.

SEC. 821. At every term of any court of the United States the district attorney, or other person acting on behalf of the United States in said court, may move, and the court, in their discretion, may require the clerk to tender to every person summoned to serve

as a grand or petit juror, or venireman or talesman, in said court the following oath or affirmation, namely: "You do solemnly swear (or affirm) that you will support the Constitution of the United States of America; that you have not, without duress or constraint, taken up arms or joined any insurrection or rebellion against the United States; that you have not adhered to any insurrection or rebellion, giving it aid and comfort; that you have not, directly or indirectly, given any assistance, in money or any other thing, to any person or persons whom you knew, or had good ground to believe, to have joined, or to be about to join, said insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States; and that you have not counseled or advised any person to join any insurrection or rebellion against, or to resist with force of arms, the laws of the United States." Any person declining to take said oath shall be discharged by the court from serving on the grand or petit jury, or venire, to which he may have been summoned.

SEC. 5512. If, at any registration of voters for an election for Representative or Delegate in the Congress of the United States, any person knowingly personates and registers, or attempts to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently registers, or fraudulently attempts to register, not having a lawful right so to do; or does any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevents or hinders any person having a lawful right to register from duly exercising such right; or compels or induces by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interferes in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer knowingly and willfully registers as a voter any person not entitled to be registered, or refuses to so register any person entitled to be registered; or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring

the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section.

SEC. 5515. Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, or procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and (*ten*) (eleven).

MEM. By the statutes of Florida upon the subject of elections (Bush's Digest, ed. 1872, and act of 1877, ch. 3021, sec. 1), the county commissioners are to appoint three inspectors of election, and these, before the opening the election, choose *a clerk* (Digest, p. 301), and then the inspectors *and clerk* take and subscribe an oath or affirmation in writing that they will perform their respective duties according to law: "Before opening the polls of any election